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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 368

ASSOCIATION ON BROADCASTING STANDARDS, INC., ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA

No. 369

THE KING'S GARDEN, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA

No. 390

WBEN, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 119-159) is not yet reported. The Commission's report and order (Pet. App. 1-58) is reported at 8 F.C.C. 2d 698; its memorandum opinion and order denying reconsideration (Pet. App. 61-118) is reported at 10 F.C.C. 2d 283.

JURISDICTION

The judgments of the court of appeals (Pet. App. 118A-118B) were entered on May 10, 1968. The petions in Nos. 368 and 369 were filed on August 2, 1968, and the petition in No. 390 was filed on August 8, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether separate adjudicatory hearings are required by the Communications Act before the Commission may validly adopt a general change in the rule relating to the presunrise operation of large classes of standard broadcast (AM) radio stations.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the Communications Act of 1934 (48 Stat. 1064, as amended, 47 U.S.C. 151-609) and of the Commission's Rules and Regulations are printed in the various petitions.

STATEMENT

These cases involve the Commission's revised rule governing presunrise operation by daytime-only radio stations and by fulltime radio stations whose licenses require them to operate with less power and/or different antenna patterns during nighttime. During daytime hours, only the groundwave signals of AM stations are of consequence, because that part of a station's signal which is directed upward (the skywave signal) is dissipated and lost. However, at night the skywave signals are reflected back to earth by the ionosphere, beyond the useful reach of the groundwave signal and often at great distances from the originating station. Skywave signals, whose intensity diminishes gradually from about two hours prior to sunrise to two hours after sunrise, provide a useful service, although they are not as reliable as the groundwave signal. Skywave signals also cause additional electrical interference at night not present during the daytime. The presence and peculiar characteristics of skywave signals reduce sharply the number of stations which can operate in the standard broadcast band at night without causing an undue amount of interference (see Pet. App. 123).

For these reasons, many commercial radio stations are either licensed for daytime operation only or are required to reduce power or change their antenna patterns at night, or both, to minimize nighttime interference problems. About half the total number of some 4200 AM stations are daytime-only stations.[1]

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[1] The court below noted that the overwhelming number of Class II stations are daytime only, that of the 858 Class III

Since there is a need for presunrise local broadcasts relating to matters such as traffic conditions, school closings and weather reports (see Pet. App. 139), the Commission's rules have, since 1941, permitted certain classes of AM stations to commence operation with their daytime modes of operation at 4:00 a.m., local standard time, although the Commission reserved the right to terminate such operation where fulltime stations on the same frequencies demonstrated that their authorized nighttime service was unduly interfered with (47 C.F.R. 73.87; Pet. App. 125, n. 3). In taking this approach, the Commission attempted to balance the competing public interest considerations in the availability of local presunrise broadcasts and in avoiding destructive interference between stations. The accommodation of these interests embodied in the Commission's rules was satisfactory until the proliferation of new AM stations (particularly daytime-only stations) following the end of World War II provoked increasing complaints of interference by fulltime stations. This resulted more and more often in termination of the interfering presunrise operations, to the disadvantage of the station and its listening public. Moreover, in 1960, a revised version of the North American Regional Broadcasting Agreement (NARBA) went into effect. The treaty made it clear that at least half of the existing presunrise operations

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stations permitted to operate at night, only 90 use the same power and antenna patterns day and night, and that another 1200 Class III stations are restricted to daytime-only operation (Pet. App. 124-125). Class II stations are secondary stations on clear channels; Class III stations are on regional channels. Class II and Class III stations are primarily involved in these cases.

were in violation of our government's international commitments (Pet. App. 127).[2]

In response to the increasing difficulties in the administration of its 1941 rule,[3] the Commission instituted a new rule-making proceeding on December 8, 1961 (26 Fed. Reg. 11911), as amended by a further notice on November 30, 1962 (27 Fed. Reg. 12063), looking toward revision of the approach toward presunrise operation. On July 13, 1967, after consideration of voluminous comments, the Commission released its report and order (8 F.C.C. 2d 698; Pet. App. 1-58) adopting a new Section 73.99 (Pet. App. 49), under which, as a general matter, presunrise operation beyond the normal license terms of affected stations may begin at 6 A.M., local standard time, with power not in excess of 500 watts.

In setting out the basic considerations which led it to this result, the Commission stated (Pet. App. 31-32):

> [T]he resolution of this proceeding necessarily represents a balance between considerations and

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[2] The Commission is authorized by law to promulgate rules and regulations to carry out treaties relating to radio to which the United States is a party (47 U.S.C. 303(r)).

[3] The number of AM stations increased from 882 in 1941 to the present 4200 plus, and the number of daytime-only stations grew from 60 to 2180 at the time of the decision below (Pet. App. 126-127). In 1958 and again in 1959, the Commission had studied possible revision of the presunrise rule, and determined that extended hours of operation for daytime-only stations without some power decreases would lead to extensive increases in interference. *Daytime Standard Broadcast Stations*, 17 Pike & Fischer R.R. 1669 (1958); *Extended Hours for Daytime Operation*, 27 F.C.C. 53, 18 Pike & Fischer R.R. 1689 (1959).

objectives which are to some degree in conflict—the provision for needed pre-sunrise service on the one hand, particularly in situations where it has been in existence before and has come to be relied upon by listeners, and on the other hand, protection of the existing service of unlimited-time stations against an inordinate amount of loss through interference and thus inefficient use of the channels involved. It is also apparent, as it has been for some time, that pre-sunrise use of daytime facilities by United States stations must be brought into line with this country's obligations, under pertinent international agreements, to protect the stations of other nations in the North American Region from objectionable interference. With respect to the regional channels, we are persuaded, after careful consideration of the record herein and the above considerations, that the most appropriate balance can be achieved by permitting virtually all [of these] stations (daytime and fulltime) to operate pre-sunrise, from 6 a.m. standard time on, with 500-watts power, using their daytime modes of operation (directional or nondirectional), except where lesser power is required to meet international obligations as mentioned above.

While recognizing that the new regulations would affect the prevailing practices of many stations, the Commission found that the practicalities of the situation precluded a station-by-station approach, stating (Pet. App. 41-42):

> We must reject the arguments * * * that a case-by-case approach must be used in this matter. Such an approach—taking into account that there are some 1,200 daytimers and 858 fulltime

> Class III stations—is simply out of the question from an administrative standpoint. The number of potential hearings involved staggers the imagination, and they would in all probability become exceedingly complex, since (with skywave interference involved) more than one daytimer usually affects a given fulltimer and, conversely, a given daytimer may affect more than one fulltimer. A given hearing situation might well end up involving a considerable number of the stations on a channel, including a comparative inquiry into which pre-sunrise operation should be permitted and which precluded. Not only would this entail an inconceivable burden, both on the Commission and on standard broadcast stations and their advisers, it would take a great amount of time, a consideration inconsistent with our view that the public interest clearly requires a reasonably prompt resolution of the "pre-sunrise" situation and the widespread uncertainties currently involved in it. We do not conceive that a more particularized approach, either by hearing or otherwise, would throw significantly more light on the appropriate course of action in a given situation, anything like enough to warrant the burden involved.

Reconsideration of the newly promulgated rule was denied by the Commission's memorandum opinion and order released October 17, 1967 (10 F.C.C. 2d 283; Pet. App. 61-118).

Upon appeals by fulltime stations objecting to the interference they would receive from presunrise operations under the new rule and by daytime stations and limited fulltime stations objecting to the limitations upon their presunrise operation, the court below

unanimously upheld the Commission's action. It held, *inter alia*, that the new rules ~~were~~ was based upon an adequate analysis of relevant factors (Pet. App. 132-140); that the Commission was not required to take into account the precise numbers of listeners who would gain and lose service (*ibid.*); and that the Commission had reasonably discharged its duty to make such regulations as it deems necessary to prevent interference and to carry out the provisions of the Act (47 U.S.C. 303(f), 303(r)) and to make a "fair, efficient, and equitable distribution of service" (47 U.S.C. 307(b)) (Pet. App. 141-142). The court held further that the Commission properly proceeded "in a rule making proceeding based upon the general characteristics of broad classes of radio stations" rather than in a "multitude of evidentiary hearings in which the particularized conflicts between daytimer and full-timer are analyzed" (Pet. App. 146-157). It found no conflict in this regard with either Section 316(a) of the Communications Act (47 U.S.C. 316(a)), which provides for an opportunity "to show cause by public hearing" why a license should not be modified, or with this Court's decision in *Federal Communications Commission* v. *National Broadcasting Co.* (*KOA*), 319 U.S. 239.[4]

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[4] The court below also noted (Pet. App. 157-159) that requests for waivers to permit expanded presunrise operation based upon claims of distinctive programming were properly to be considered on an *ad hoc* basis after some experience had been gained under the new rule.

ARGUMENT

The presunrise rule here attacked was adopted by the Commission following a rule-making proceeding in which extensive comments of interested parties were considered. Petitioners assert that the new rule will affect the operations of many existing stations, either by exposing them to increased interference (petitioner in No. 390) or by reducing the scope of their present presunrise operations (petitioners in Nos. 368 and 369). They argue, in substance, that all affected stations were entitled to individual adjudicatory hearings before such changes could be made, and that the Commission was precluded from proceeding by general rule.

The court below concluded that the Commission's broad rule-making powers[5] were properly invoked to resolve the problems presented by increasing presunrise operation and to ensure compliance with pertinent treaty restrictions, and that individual adjudicatory proceedings in these circumstances were neither

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[5] 47 U.S.C. 303(r) provides that the agency may "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party." Section 303 also authorizes the Commission by rule to classify radio stations (303(a)), prescribe the nature of the service to be rendered (303(b)), assign frequencies and regulate power (303(c)), regulate the apparatus to be used with respect to its external effects (303(e)), and establish zones or areas to be served by any station (303(h)). See also 47 U.S.C. 154(i).

feasible nor required by statute. The decision below is clearly correct, and conflicts with no decision of this Court or of another court of appeals. Accordingly, further review is not warranted.

1. It is well established that administrative agencies have authority to adopt and apply general rules applicable to a broad class of persons subject to their jurisdiction without conducting separate adjudicatory proceedings for each person affected, even where the regulatory statute requires a hearing before individual licenses or certificates may be modified. *E.g.*, *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192; *Federal Power Commission* v. *Texaco*, 377 U.S. 33. In *Storer*, for example, this Court held that the statutory right to a hearing before denial of an application for a broadcast license did not prevent the Commission from promulgating general standards relating to multiple ownership by rule and summarily disposing of applications of persons ineligible under the rule.

While the specific rule at issue in *Storer* concerned the treatment of future license applications, the principle of that decision has been applied to situations, like that in the instant case, involving the effective modification by general rule of existing licenses. *California Citizens Band Association* v. *United States*, 375 F.2d 43 (C.A. 9), certiorari denied, 389 U.S. 844; *Air Lines Pilots Association* v. *Quesada*, 276 F.2d 892 (C.A. 2); *American Airlines, Inc.* v. *Civil Aeronautics Board*, 359 F.2d 624, 628-629 (C.A.D.C.), certiorari denied, 385 U.S. 843. In those cases the courts have reasoned that, if an agency's power to promul-

gate general rules were regarded as being limited by other statutory provisions prescribing separate evidentiary hearings in cases "concerned with * * * facts peculiar to an individual licensee" (*California Citizens Band Association, supra*, 375 F.2d at 52), "the processes of regulation" would be "prolonged" and "crippled" (*Texaco, supra*, 377 U.S. at 44). Nothing in Section 316 (a) of the Communications Act, on which petitioners principally rely, purports to restrict the Commission's rule-making authority. That provision simply provides an opportunity for an evidentiary hearing where a particular station's license is modified on an individual basis. Thus, the court below correctly resolved the issue in stating (Pet. App. 148-149):

> Adjudicatory hearings serve an important function when the agency bases its decision on the peculiar situation of individual parties who know more about this than anyone else. But when, as here, a new policy is based upon the general characteristics of an industry, rational decision is not furthered by requiring the agency to lose itself in an excursion into detail that too often obscures fundamental issues rather than clarifies them. * * *[6]

Petitioners' reliance upon this Court's decision in *Federal Communications Commission* v. *National Broadcasting Co. (KOA)*, 319 U.S. 239, is misplaced.

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[6] Indeed, this Court has consistently recognized that any agency's responsibility to carry out its task clearly requires this degree of flexibility. *Permian Basin Area Rate Cases*, 390 U.S. 747; *American Commercial Lines* v. *Louisville & N. R.R. Co.*, 392 U.S. 571; *United States* v. *Southwestern Cable Co.*, 392 U.S. 157.

In that case station KOA (licensed to NBC) operated on a clear-channel frequency, and station WHDH sought permission to operate fulltime (instead of only daytime) at increased power on the same frequency. This Court held that a grant of WHDH's application would substantially modify KOA's license and, accordingly, that KOA was entitled to intervene as a party to the WHDH proceeding. Rule making was involved in *KOA* only in the sense that WHDH's application would have required a reclassification of KOA's frequency (see 319 U.S. at 242, 258). Nothing in *KOA*, or in Section 303(f) of the Act, on which petitioners also rely, suggests that the Commission is powerless to promulgate general rules affecting hundreds of stations without conducting a separate adjudicatory proceeding relating to each of them.[7]

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[7] Nor did this Court suggest in *KOA* that Section 303(f) of the Communications Act entitled a station to a hearing on an indirect modification resulting from increased interference. While the majority of the lower court in *KOA* did hold that Section 303(f) afforded a limited right to a hearing, this Court (contrary to petitioner WBEN's claim, Pet. No. 390, 12) rested its decision solely on Section 312(b) (now Section 316). Section 303(f) (47 U.S.C. 303(f)) affords a "public hearing" to a station whose "frequencies, authorized power, or * * * times of operation" are changed. But the court below properly held that it does not apply to indirect modification, or to the stations whose presunrise operations are limited, since the latter never had an unfettered right to operate at daytime power before sunrise (Pet. App. 153-154). This latter consideration is also an additional bar to the claim of a right under Section 316(a) to an adjudicatory hearing by daytimers and restricted fulltimers seeking expanded presunrise operation. Indeed, in *Music Broadcasting Co.* v. *Federal Communications Commission*, 217 F.2d 339 (C.A. D.C.), the permissive nature of the presunrise operation authority of daytimers under the old rule was expressly upheld (see Pet. App. 152-153).

Contrary to petitioners' contention, the decision below is fully consistent with *Transcontinent Television Corp.* v. *Federal Communications Commission*, 308 F. 2d 339 (C.A.D.C.), and *Goodwill Stations, Inc.* v. *Federal Communications Commission*, 325 F.2d 637 (C.A.D.C.). Both cases involved much narrower situations than that presented here: *Transcontinent* concerned a channel change of one television station ordered by the Commission, and *Goodwill* involved the opening of 13 clear channels to additional stations. In both cases the court sustained the Commission's power to effect changes by rule making effective at the end of a license term, holding that any requirements for an evidentiary hearing in Sections 303(f) and 316(a) were inapplicable. Whatever procedure might have been required had the changes in *Transcontinent* and *Goodwill* been effected during the terms of the existing licenses—a question which the courts in those cases did not have to reach—can have little bearing on the instant case, which involves a rule of far broader applicability reflecting a basic policy determination which the Commission found it necessary to make.[8]

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[8] Revision of the presunrise rule was needed not only because of the growing chaos which the proliferation of radio stations since 1941 had caused (see note 3, *supra*), but in order to ensure compliance with our government's obligations to Canada under the North American Regional Broadcasting Agreement, ratified by the Senate in 1960, and a subsequent understanding particularizing the standards to be applied under that treaty to avoid undue interference by American stations with Canadian broadcasters (see Pet. App. 6-13, 101-103). As the court below pointed out (Pet. App. 145), "[T]he successful conclusion of the Canadian Agreement

Thus, the court below properly found no conflict among the circuits (Pet. App. 151-152).[9]

2. The court below fully assessed, and properly rejected, the contention (see Pet. No. 368, 12-13) that the Commission was required to make findings on precise gains and losses of listeners by stations under the new rule. It noted, *inter alia*, that the Commission reasonably found that those losing one service would generally have alternative services, that determining the effect on all available signals would be "an enormous task" as to which the parties had given no meaningful assistance, and that quantification was not necessary in view of the governing qualitative differences in the needs of various classes of listeners (Pet. App. 132-140).[10] Thus, as the court of appeals' painstaking analysis of petitioners' claims of agency arbi-

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powerfully supports the Commission's solution—for the first time presunrise operations have been placed on a basis consistent with our international obligations."

[9] *California Citizens Band Association* v. *United States, supra,* as pointed out above, enunciates the principle followed here. Decisions of the District of Columbia Circuit in *Saltzman* v. *Stromberg-Carlson Telephone Manufacturing Co.*, 46 F.2d 612, and *Courier-Journal Co.* v. *Federal Communications Commission*, 46 F.2d 614 (see Pet. No. 368, 10), have already been distinguished by that circuit in *Transcontinent, supra,* where the court pointed out that they predated the enactment of the Administrative Procedure Act.

[10] Thus, as the court noted (Pet. App. 132-133), those losing some fulltime service from 6 a.m. to sunrise are either close to large cities whose fulltimers generally provide ample service, or are in distant rural areas with alternative regional services. Most listeners gaining presunrise service, on the other hand, had a demonstrated need for local programs not otherwise available (Pet. App. 139).

trariness clearly demonstrates (see Pet. App. 132-142), the Commission acted on the basis of sufficient information relating to the considerations pertinent to a reshaping of the presunrise rule (see, *e.g.*, Pet. App. 20-42, 44-48, 63-108).

Finally, the court below properly rejected the argument that the Commission could not disregard showings relating to specific programming made by particular daytime stations seeking to provide expanded presunrise service (Pet. No. 369, 12-13).[11] The court correctly held (Pet. App. 157-159) that, because of the nature of the proceeding and the impermanence of specific programming, the Commission could reasonably consider such contentions upon subsequent waiver applications filed after some experience with the new rule had been gained. See *Permian Basin Area Rate Cases*, 390 U.S. 747; *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192.

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[11] Moreover, the Commission did not reject programming as a relevant consideration; it relied heavily on the value of local presunrise programs (see Pet. App. 139).

CONCLUSION

For the foregoing reasons, the petitions for writs of certiorari should be denied.

Respectfully submitted.

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